

**Documentation – Role of Forensic Examiners**  
**SART Listserv**  
**October 2007**

*States are listed as a reference; not necessarily as a statewide perspective.*

**Issue:** How strictly do you adhere to the role of medical provider vs. law enforcement agent during medical forensic examinations?

**Background:** SANEs have been called biased in court for sounding too much like investigators and other SANEs have been commended for giving details helpful to investigators (such as color of car, description of assailant etc).

**Colorado**

- Nurses (whether SANE or not) must practice within their State Scope of Practice and adhere to the State Board of Nursing regulations in which they practice. How one defines the "role" of the Forensic Nurse can be determined by the scope and standards of the specialty of Forensic Nursing as noted by the American Nurses Association, IAFN and in the Forensic Nursing Research.
- As a licensed health care provider (licensed in multiple states), I must adhere to the Nurse Practice Act and the state board of nursing regulations in the state that I am working. By definition, I am a licensed health care professional.
- As an independent and professionally licensed health care provider that sees survivors of sexual assault, advocates working with me are health care paraprofessionals and professionals. Our model of care does not place emphasis on the word "Victim" as noted by so many. We work closely as a team of paraprofessionals and professionals.
- Patient/client information that is shared with law enforcement is based on the fact that a crime has occurred and the information is pertinent to the case. The information is given to law enforcement only after obtaining the patient/client's written consent. For example, if a victim informs an examiner that a perpetrator was driving a 2007 Maroon Lexus...yes, that information is given to law enforcement.

**Maine**

- The Attorney General's Office pays for the exams regardless of whether a victim reports to law enforcement or not.
- The SAFE/SANE must be independent of law enforcement to prevent challenges of bias about the evidence collected.
- The only exchange between the Examiner and law enforcement is to hand the kit over to them upon completion.

**Maryland**

- I work with a couple of different SAFE/SANE programs and have found what I consider a fundamental difference in philosophy. Some forensic nurses see themselves as independent practitioners; others consider themselves as an agent of

- law enforcement. In the latter programs, the nurses see themselves as being under the direction of the police, whom they consider to be their "client/consumer."
- From an advocacy point of view, I find that this philosophical orientation has an impact in a number of ways. Perhaps it would be useful for SAFE/SANE programs to address this in their mission statement and with their SARTs, as I do think it has a bearing on expectations and on collaborative relationships.

### **Michigan**

- As a nurse, you should document what is applicable to formulating your nursing plan of care and supports your interventions. I'm not sure how you would justify a description of car color within this context...
- In the course of safety assessment/planning, information obtained and documented may be seen as helpful by law enforcement, but is actually used to increase the likelihood of safe discharge from your care.
- A well done and documented medical forensic exam may be helpful to law enforcement but is helpful to the patient you are caring for.

### **New York**

- I hear of programs where nurses' contact with law enforcement is very restricted and keep the history to only what is pertinent the treatment of the medical care that the individual patient/client/person is presenting with.
- Through my own experience and the experience of my colleagues, information about the perpetrator only served to discredit us as biased in court.
- We are not there to support either side of the case; we are there to care for our patients.
- My own opinion is that we should stick to being medical providers and writing history relevant to potential problems but include clear facts provided by the patient. Forensic examiners are providing medical/nursing care via a standard process of assessment, identification of problems and the formulation and implementation of a plan to address those problems.
- The history is an essential part of creating the plan of care for all patients.

### **Texas**

- As an advocate, we explain to victims, before they consent to the exam, that everything the SANE collects, (be it history, fluid, or photos) will be made available to law enforcement for the purpose of investigation and prosecution.
- Victims can refuse any part of the exam, but whatever is collected will be made available to law enforcement.

### **Wyoming**

Let's start with some first principles. I assume that the patient has consented to an exam for evidence collection and documentation and executed a release to that effect:

- In that instance, the SANE nurse has a dual role, health care provider for the patient and agent for law enforcement to facilitate the proper collection and documentation of evidence. In that second role, the SANE becomes a member of the prosecution "team." That has constitutional significance in terms of the prosecution.
- As a part of the prosecution team, SANEs have an obligation to disclose to the prosecutor any evidence that the SANE has that is "favorable" to the defendant.

***Favorable evidence would include:***

- Evidence mitigating a defendant's punishment, *Brady, supra*;
- Evidence directly opposing a defendant's guilt. *Commonwealth of Northern Mariana Islands v. Bowie*, 236 F.3d 1083 (9<sup>th</sup> Cir. 2001);
- Evidence indirectly opposing a defendant's guilt [third party perpetrator evidence and uncharged crimes evidence], *People v. Clark*, 3 Cal.4<sup>th</sup> 41, 133-34 (1992);
- Evidence supporting defense evidence disclosed to the prosecution in reciprocal discovery, *People v. Collie*, 30 Cal.3d. 43, 54 (1981)
- Evidence supporting a defense motion that would reduce the prosecution's evidence. *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9<sup>th</sup> Cir. 2000); and
- Evidence impeaching a material prosecution witness. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

***Impeachment evidence would include, for example:***

- Contradictory and conflicting statements of a witness. *Strickler v. Greene*, 527 U.S. 263, 282 and fn. 21 (1999).
  - Previous false reports by a witness. *People v. Santos*, 30 Cal.App.4<sup>th</sup> 169 (1994).
  - Evidence contradicting a witness' statement. *Leka v. Portuondo*, 257 F.3d 89 (2<sup>nd</sup> Cir. 2001).
  - Inaccuracies undermining a state's expert witness' expertise. *People v. Hayes*, 3 Cal.App.4<sup>th</sup> 1238, 1245 (1992).
  - Evidence indicating a lack of thoroughness or integrity in the investigation. *U.S. v. Howell*, 231 F.3d 615, 625-26 (9<sup>th</sup> Cir. 2000).
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- The prosecutor, if s/he determines the evidence to be constitutionally "favorable" to the defendant, must disclose that evidence to the defense. If s/he (the prosecutor) fails to do so, it is a constitutional violation, even if the prosecutor was unaware of the information.
  - It is an ethical violation if the prosecutor knew of the information and suppressed it from the defense. The fact the information is disclosed does not necessarily mean that it will be admissible at trial. For example, the patient may have disclosed having consensual sex with someone earlier the same evening as the assault. The rape shield statute in that jurisdiction most likely bars such evidence.

- But if the information the patient gives the SANE falls within one of the 6 categories of “favorable” evidence it must be disclosed to and evaluated by the prosecutor to determine whether it is required to be disclosed to the defense.

***Regarding bias: (This represents a single, prosecutor’s perspective)***

- A SANE nurse must be unbiased to be effective, but what does that mean? I would hope that investigating officers, SANE nurses, forensic pathologists, DNA analysts, etc. would be unbiased and professionally objective in the performance of their work and in their sworn testimony in court.
- That does not mean that they cannot be “victim-centered” or “compassionate” in their conduct with the patient/victim.
- It also means that if the patient provides the SANE with information that the SANE recognizes may assist an investigation the SANE should, of course, pass that information along to investigators.
- That does not mean the SANE is abdicating his/her objectivity any more than the pathologist who provides information to investigators regarding time of death abdicates their objectivity.

***Forensic Examiner Response:***

- Personal and private information is pertinent patient history that is placed in the medical record and is not part of the Forensic Medical Chart. (This is not evidentiary information).
- Privileged communication is part of the patient and health care provider relationship.
- When a patient comes to me, post rape, and has been in my care for the past five years prior to her rape, all of her medical history is not openly shared with law enforcement or the prosecutor.
- There are grave concerns when a health care provider discloses information to third parties not pertinent to the case as allowed by law. As nurses, we are accountable to our professional standards and Code of Ethics.